IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-5993

JOHN E. TEST, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

While Petitioner still maintains that the issues of the instruction of the jury below and the prosecutor's improper closing arguments (p. 12-20 of the Petition for Certiorari) present adequate grounds for the granting of certiorari, Petitioner would like to join in the Solicitor General's construction of the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq. (Memorandum for the United States, at p. 7-9.)

"[T]he Jury Selection and Service Act goes beyond prohibition of 'intentional' distortions and provides that

in certain cases affirmative measures must be undertaken to insure that 'juries [are] selected at random from a fair cross section of the community. . . .'" United States v. Fernandez, 480 F.2d 726, 733 (2d Cir. 1973) (citing 28 U.S.C. § 1863(b)(2); H.Rep. No. 1076, 1968 U.S. Code Cong. & Adm. News 1792, 1794). See also United States v. Butera, 420 F.2d 564, 568 N. 7 (1st Cir. 1970), where the First Circuit stated that it had supervisory powers "over and above" the constitutional requirements in dealing with federal juries.

Indeed, if the Congressional intent is to be fostered, the statute must be given a broad interpretation. The statutory mandate of juries "selected at random from a fair cross section of the community," 28 U.S.C. § 1861, can only be interpreted as going beyond the Sixth Amendment decisions of this Court and requiring positive, affirmative steps to achieve the policy and rights fostered by §§ 1861 and 1862. See, e.g., § 1863(b)(2), which requires supplementation of the voter registration lists when the latter "do not adequately reflect a cross section of the community." H.Rep. No. 1076, supra, at 1794. And see § 1863(b)(3), which states that the procedures utilized in selecting names for jury panels "shall be designed to ensure the random selection of a fair cross section of the persons residing in the community in the district or division wherein the court convenes." When read together, these statutory sections and

the relevant legislative history make clear that the provisions of the statute create an affirmative burden to achieve "a fair cross section of the community," and not merely negate discrimination in selection.

For these reasons, Petitioner joins in the position of the Solicitor General and suggests that a remand be granted herein, giving Petitioner the opportunity to inspect the jury lists and attempt to prove his motion challenging the array in the district court.

Respectfully submitted,

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